No. 892

In the Supreme Court of the United States

October Term, 1944

PARKE, AUSTIN & LIPSCOMB, INC., ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 478) is reported in 142 F. (2d) 437. The findings of fact, conclusion, and order of the Federal Trade Commission (R. 48) are reported in 34 F. T. C. 591.

JURISDICTION

The decree of the Circuit Court of Appeals was entered May 26, 1944 (R. 495, 497). The petition for a writ of certiorari was filed August 24, 1944. The jurisdiction of this Court is invoked

under Section 5 (c) of the Federal Trade Commission Act, as amended, c. 49, 52 Stat. 111, 15 U. S. C. 45 (c), and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Commission, having determined that the corporate name of petitioner, Smithsonian Institution Series, Inc., was deceptive and misleading, abused its discretion in requiring discontinuance of the use of the words "Smithsonian Institution" in petitioners' corporate name or otherwise, to designate an organization operating for profit and not a part of or directly connected with the Smithsonian Institution of Washington, D. C.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * * *
>
> (c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United

States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, * * *. * * * Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, * * *. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. * * *

STATEMENT

In a proceeding under Section 5 of the Federal Trade Commission Act, the Commission concluded that the acts and practices of petitioners, set forth in the Commission's findings, constituted unfair methods of competition in interstate commerce and unfair and deceptive acts and practices in such commerce (R. 56). The Commission thereupon entered an order directing petitioners to cease and desist from using in interstate commerce the acts or practices specified in six numbered subparagraphs of the order (R. 57–59). In a proceeding brought in the court below to set aside this order, the court upheld the validity of all of its provisions. The petitioner now seeks re-

view only of the affirmance of subparagraph (5) of the order, which requires petitioners to discontinue use of the words "Smithsonian Institution" in their trade or corporate name or in any other manner, as long as petitioners are operating for profit and are not a part of or directly connected with the Smithsonian Institution of Washington, D. C.

Petitioners do not now question the sufficiency of the evidence to support the findings of the Commission. Among these findings the following are pertinent:

Petitioner Parke, Austin & Lipscomb, Inc., and its wholly owned subsidiary, petitioner Smithsonian Institution Series, Inc., are New York corporations engaged in publishing and selling a 13-volume set of books designated "Smithsonian Scientific Series" (R. 49–50). As a result of negotiations between Parke, Austin & Lipscomb and the Smithsonian Institution of Washington, D. C., Smithsonian Institution Series, Inc., was organized in 1926 and entered into a contract with the Smithsonian Institution to publish a set of books from manuscripts furnished by the Institution. It agreed to reimburse the Smithsonian Institution for the cost of preparing the manuscripts, and to pay it a royalty of 10% of gross sales. (R. 51.) The purpose in organizing Smithsonian Institution Series, Inc., was to keep the sale and distribution of this set of books separate

from other publications sold by Parke, Austin & Lipscomb (*ibid.*). Apart from the royalty payment, no part of the profits of the enterprise go to the Smithsonian Institution (R. 53).

The Smithsonian Institution of Washington, D. C., is, and has long been identified in the public mind as, a nonprofit organization devoted to scientific research and the promotion of learning (R. 54). The use of the words "Smithsonian Institution" in the corporate name of petitioner, Smithsonian Institution Series, Inc., constitutes a false and misleading representation that this corporation is a part of, or connected with, the Smithsonian Institution (*ibid.*). This use and other acts and practices in which petitioners have engaged have a tendency to, and did, deceive a substantial part of the purchasing public into the erroneous belief that they were purchasing the books designated as "Smithsonian Scientific Series" directly from the Smithsonian Institution of Washington, D. C., and that the entire profits derived from their sale accrued to that Institution (R. 55).

With reference to the Commission's prohibition of use of the words "Smithsonian Institution," the court below said (R. 484):

> There may well be some alternative remedy less drastic but adequately effective which might satisfy the requirements of fairness and should be adopted. On this record, however, we cannot be sure that the Com-

mission has abused its discretion in this respect, and only in that event should we interfere with its action. Compare, *Herzfeld* v. *Federal Trade Commission,* 2 Cir., 140 F. (2) 207.

ARGUMENT

The question whether the deception resulting from the use of the words "Smithsonian Institution" can be effectively cured by some means other than requiring elimination of these words from the corporate name, for example, by requiring that all letterheads carry the statement "The Company operates for profit and is not a part of the Smithsonian Institution of Washington, D. C.," involves no legal problem, resolution of which by this Court would serve as a useful guide to circuit courts of appeals in applying the Federal Trade Commission Act. The court below merely held that the Commission's determination as to the remedy necessary to terminate the unlawful practices which it had found should be set aside only upon a clear showing of abuse of administrative discretion, and that in this case such abuse was not shown. This decision presents no important or unsettled question of federal law, and it does not conflict with any applicable decision of this Court.

The petitioners seem to suggest that the holding below is in conflict with *Federal Trade Commission* v. *Royal Milling Co.,* 288 U. S. 212. In that case the Commission found that use of the words "mill" and "milling company" as part of the

corporate or trade names of companies which do not grind wheat into flour but mix different blends of purchased flour, was deceptive and tended to divert trade from competitors. This Court sustained the Commission's findings and conclusions, but was of the opinion that it "went too far" in ordering that the words in question be eliminated from the respondents' corporate and trade names. It said (p. 217):

> The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; and this can be done, in the respect under consideration, by requiring proper qualifying words in immediate connection with the names.

This decision has not been interpreted as laying down any general rule that a corrective statement to accompany a misleading trade name is adequate to remove the deception which it causes and that any contrary determination by the Commission is to be set aside as an abuse of discretion. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 81–82; *Federal Trade Commission* v. *Army & Navy Trading Co.*, 88 F. (2d) 776, 779–780 (App. D. C.). While the court below may have accorded somewhat greater weight to the administrative determination than did this Court in the *Royal Milling* case, a comparison of the facts of the two cases reveals that the reasons for the relief ordered by the Commission in this

case are a great deal more persuasive than those which could be said to justify the order in the *Royal Milling* case. Even a broader judicial inquiry as to the appropriateness of the remedy could hardly lead a court to conclude that the means chosen by the Commission to dissipate the misrepresentation implicit in the use of the name "Smithsonian Institution" is wholly inappropriate and arbitrary. In the *Royal Milling* case, this Court was strongly influenced by the fact that "These names have been long in use, in one instance beginning as early as 1902. They constitute valuable business assets in the nature of good will, the destruction of which probably would be highly injurious * * *" (288 U. S. at 217). In this case, the value of petitioner Smithsonian's name is in greatest part a value which flows from its tendency to imply a unity with the Smithsonian Institution of Washington, D. C., for the publication and sale of the "Smithsonian Scientific Series" is petitioner Smithsonian's exclusive activity (R. 51).

Petitioners stress *Herzfeld* v. *Federal Trade Commission,* 140 F. (2d) 207, decided by the Circuit Court of Appeals for the Second Circuit in February 1944. The court in that case, in declining to amend an order of the Commission which required elimination of the word "Mills" from a trade name which the Commission had found to be misleading, said (p. 209) that decisions of this Court subsequent to the *Royal Milling* case

had "as much circumscribed our powers to review the decisions of administrative tribunals in point of remedy, as they have always been circumscribed in the review of facts." But although Judge Swan placed his concurrence in the decision below upon the ground that under the *Herzfeld* case, courts were without power to set aside the relief which an administrative tribunal believed to be necessary (R. 486), the majority opinion clearly does not regard judicial review of the remedy as foreclosed (R. 484). The *Herzfeld* case is cited, not as controlling upon the issue before the court, but as an analogous case in which the facts did not overcome the presumption of correctness attaching to the Commission's determination.

CONCLUSION

The ruling below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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